IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

JOHN ANDERSEN, *Appellant*,

vs.

MORGAN TREAT, U. S. MARSHAL FOR THE EASTERN DISTRICT OF VIRGINIA, *Appellee*.

APPELLANT'S BRIEF.

Appeal from an Order of the District Judge for the Eastern District of Virginia, denying a Writ of Habeas Corpus.

STATEMENT.

The following extract from the petition for the writ sets out the facts in regard to the question raised:

"Your petitioner represents that on the 7th day of November, 1897, he was delivered to the United States Marshal for the Eastern District of Virginia, charged with having committed the crime of murder within the maritime jurisdiction of the United States of America; that as a prisoner of the said United States Marshal, he was confined on the day of his delivery in the city jail, of the city of Norfolk, to await his examination as provided by law, before the United States Commissioner for the Eastern District of Virginia, and that on that day, namely, the 7th day of November, 1897, while thus detained in the city jail of the city of Norfolk, he employed as counsel to represent him, one P. J. Morris, Attorney-at-Law, residing in the city of Norfolk, Virginia.

Your petitioner further represents that after securing the services of said Morris, on the same day the said Morris called at the city jail, the place of the detention of your petitioner, and asked permission to see your petitioner to consult with him as attorney and client.

Your petitioner represents that admission was refused l is said attorney for the reason that the District Attorney for the United States, for the Eastern District of Virginia, had instructed the jailer and others in charge of your petitioner, to allow no one, without exception, to see your petitioner; whereupon he represents that on the 7th day of November, 1897, his said attorney asked permission by 'phone of the District Attorney for the Eastern District of Virginia, to permit him to visit said jail and consult with your petitioner. The said application was refused, and on account of the order of the District Attorney lodged with the jailer and keeper of the prison in which your petitioner was detained, your petitioner was denied the right of the assistance of counsel to represent him.

Your petitioner further represents that the District Attorney for the Eastern District of Virginia informed your petitioner's counsel on the night of the 7th of November, 1897, that he would let him know on the following day whether or not permission would be granted your petitioner's counsel to consult with your petitioner. Your petitioner represents that instead of informing his said attorney, and giving his said attorney full notice as to the time when your petitioner's preliminary hearing would be held, and before the United States District Attorney for the Eastern District had given his said attorney permission to consult with him, he was taken, in irons, handcuffed, to the office of the United States Commissioner, and examined without the aid or presence of his attorney.

Your petitioner further represents that before the time of said examination was completed, and statements made by him were finished, his said attorney discovered that the said examination was going on without his presence, and before any consultation could be held between your petitioner and his said attorney. His said attorney thereupon applied to the District Attorney of the

United States, and to the Hon. Robert Hughes, late Judge of the Eastern District of Virginia, and was told by them that as the defense of your petitioner was inconsistent with the defense of the others charged at the same time with complicity in the destruction of the vessel Olive Pecker, that any attorney representing both prisoners was objectionable, and that the court would not permit the same attorney to represent your petitioner and the other prisoners, and therefore the court would assign him an attorney to represent him.

Your petitioner therefore represents that he was deprived of the free exercise of his rights to be represented by counsel in accordance with Article VI. of the Amendments to the Constitution of the United States, and that, therefore, the action of the court in depriving him of the right to select his own counsel the court exceeded its power and jurisdiction, and that, therefore, the trial and proceedings therein are null and void, and that the judgment and sentence of the court are void and in violation of his constitutional rights, as he will show." (Record, pages 1 and 2.)

Question Involved.

The question involved in this application is as follows: In any criminal prosecution under the laws of the United States, if a person charged with a capital offence is denied the right to have the assistance of counsel for his defense, *of his own selection*, is the denial of that right an act in *excess* of the *power* or *jurisdiction* of the court?

Assignment of Error.

The court erred in refusing to award your petitioner a writ of habeas corpus, as prayed for in his application, as it appeared from the petition that your petitioner was entitled thereto, and as said petition shows that the court exceeded its power and jurisdiction in denying your petitioner the right of selecting his own counsel as guaranteed by law. (Record, page 6.)

Points of Law and Fact.

The question involved in this controversy is based upon Article VI. of the Amendments to the Constitution of the United States, which is as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.*"

The latter portion of Article VI. of the Amendments to the Constitution which says, *and to have the assistance of counsel for his defense,*" is the guaranteed right claimed to have been violated, and that the denial of this right in any criminal prosecution, and especially in any prosecution for a capital offense, is an act in *excess* of the *power* or *jurisdiction* of the court.

We submit that to have counsel of his own selection is implied in the guaranteed right "*to have the assistance of counsel for his defense.*" We proceed upon the theory, therefore, that what is here implied, is as much a part of the constitutional guaranty, as what is expressed in words "and to have the assistance of counsel for his defense;" and that this part of Article VI. means "to have the assistance of counsel for his defense" *of his own selection.*

In Ex parte Yarbrough, 110 U. S. 651, Mr. Justice Miller said:

"That what is implied is as much a part of the instrument, as what is expressed. This principle in its application to the Constitution of the United States more than to almost any other writing, is a necessity by reason of the inherent inability to put into words all derivative powers."

Has this Court Jurisdiction?

It is too well established by a long line of decisions handed down by this court, that it has jurisdiction to review by *habeas corpus* the conviction of a person by an inferior court of the United States, upon all questions involving the deprivation of constitutional rights in excess of the power or jurisdiction of inferior courts. We refer to the following authorities, establishing the jurisdiction of this court to entertain this application.

100 U. S. R., Ex parte Siebold, 371, 6-7.
18 Wall, Ex parte Lange, 163, 175, 6-7-8.
93 Wall, Ex parte Parks, 21, 2-3.
110 U. S. R., Ex parte Yarbrough, 651, 3.
114 U. S. R., Ex parte Wilson, 418, 422, 6-8-9.
121 U. S. R., Ex parte Bain, 1.

We therefore submit that there can be no doubt as to the jurisdiction of this court, the question being an act (as claimed by the petitioner) in excess of the power or jurisdiction of the lower court; it having no jurisdiction, power or authority, over *the person of the accused* to the extent of denying him the independent right *to select his own counsel* at any stage of the proceeding.

Is this a Jurisdictional Question?

In Ex parte Bigelow, 113 U. S. R., 228, Mr. Justice Miller, who delivered the opinion of the court, said:

"It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of the court so as to make its action when erroneous a nullity."

Reference having been made to Article VI. of the Amendments to the Constitution of the United States, we also refer to Section 1034 of the Revised Statutes, which says among other things:

"That upon the request of a person who is indicted for any capital offense the court shall, upon his request, assign him such counsel, not exceeding two, *as he may desire.*"

Petitioner's counsel submit that this section of the Revised Statutes so far as the petitioner's rights are concerned in the selection of counsel as he desired, has been violated as well, but is referred to at this stage in order to assist them in giving to that portion of Article VI. of the Amendments to the Constitution, viz.: "*and to have the assistance of counsel for his defense,*" its proper interpretation, and to demonstrate that to have counsel of his own selection, or such counsel as he may desire, is easily implied. In other words, construing both this portion of Article VI. and Section 1034 of the Federal Statutes together, there can

be no doubt but that the right "to have the assistance of counsel for his defense" includes the right to select his own counsel.

Mr. Thompson on Trials, Section 920, pages 702-3, says: "The right to appear and defend, is undoubtedly an absolute right existing in all cases, civil and criminal, of which no court has the power to deprive the party."

In Section 921, "*in criminal cases*, the right of accused persons to be defended by counsel, is a right of a very high nature, which is guaranteed by the Constitution of the United States."

"Under these constitutional guaranties, it is the *unquestioned* right of every person tried upon a charge of crime, to be heard by the court, and jury," etc.

Mr. Cooley, on Constitutional Limitations, page 403, says: "Perhaps the privilege *most important* to the person accused of crime connected with his case, is that he be defended by counsel."

We submit, therefore, that in treating of this question the authorities are unanimous in proclaiming that there is no higher right vouchsafed and granted under our laws. If therefore it is difficult, as Mr. Justice Miller says, in Ex parte Bigelow, "to determine what matters go to the jurisdiction of the court, so as to make its action when erroneous a nullity," there can be no question that if the highest privilege granted under our Constitution is denied or violated, that its denial is an act in excess of the jurisdiction or power of the court. We submit that if this *most important* privilege did not mean that the prisoner has the right, as well not only to have the assistance of counsel, but *to select his own counsel*, the effect of this fundamental provision would be reduced to a nullity.

Mr. Black in a late work on Constitutional law under Section 254, says:

"Under our constitutional provision the right to have the assistance of counsel includes the right of the prisoner to have a private interview with, and consultation with his counsel before the trial, or even before the indictment is found, if he is under arrest, in order to take his advice and instruct him as to his

defense to be heard." And refers to People vs. Riseley, 13 Abb. N. C. (N. Y. 186).

We submit that the right "to have the assistance of counsel of his own selection" is a right that begins from the time a person is arrested, and before brought into court, and we do not deem it necessary to offer any long line of authorities upon this question; the right is so fundamental that since the organization of our Federal judiciary up to this day, covering a period of more than a century, this right has never before been questioned, and no record reveals the fact that this court has ever had occasion to pass upon it. We claim that all persons accused of crime have the right to the assistance of counsel *of their own selection* under our constitutional guaranties from the time arrested until the day of execution if it is demanded, and any court that interferes with the exercise of this right, or denies it in any criminal prosecution, violates the highest privilege and most important provision of our Constitution, and the highest and most absolute right under its provisions, and that any act denying the free exercise of this right, is an act in excess of the power and jurisdiction of any court or judge.

In Ex parte Bain, 121 U. S., 1, it was held that the amendment of an indictment, with the consent of the trial judge, was a jurisdictional question, and should be reviewed by *habeas corpus* proceedings. It was held in this case, that by the mere alteration of an indictment, which consisted *in striking six words from its face*, was an act of the court which nullified all proceedings under it, and was an act in excess of the power and jurisdiction of the court. In this case the indictment found was regular. There was no exception to its manner or form, until the trial court ordered the words stricken from its face. If then the highest right guaranteed by the organic law has been violated, and the most important privilege has been denied a person, why is not an act which violates that right, and which denies that privilege in excess of the power and jurisdiction of the court? We submit that the denial of the right so important as the defense by counsel of the accused's own selection would prove more prejudicial,

affecting the absolute independence of his whole trial, than the error of allowing an amendment to an indictment.

It has been held that the phrase "jurisdiction" has a broader meaning than mere territorial jurisdiction, but has an enlarged meaning equivalent to the words "authority, cognizance or power of the courts," and it is a fundamental proposition, therefore, that if a court transcends its jurisdictional powers its judgments will be void.

Boswell vs. Otis, 9 How. U. S., 336.

In re Hans Neilson, 131 U. S., 185, Mr. Justice Bradley, in his opinion, says:

"In the present case the sentence given was beyond the jurisdiction of the court, because *it was against the expressed provision* of the Constitution, which bounds and limits all jurisdiction."

We submit, therefore, that Article VI. of the Constitution confers an absolute right upon the prisoner, and places a limitation upon the authority of the trial court or judge thereof, by implication, and that the jurisdiction of the court over the person in no wise extends to the selection of counsel for him, and does not permit any interference with the right of the prisoner in the selection of his counsel.

In re Staff, 63 Wis., 235, we find a conviction after an unlawful and unauthorized waiver of a jury trial, which is a privilege conferred by Article VI. of the Amendments to the Constitution, which article also confers the right *to have the assistance of counsel for his defense*, is void for want of jurisdiction, and that the prisoner may successfully attack the judgment upon *habeas corpus* proceedings.

Applying this rule to Federal practice the results are the same, for it is a well-established fact that the prisoner himself cannot waive a trial by jury in capital cases or other felonies, and that if allowed to do so the proceedings would be void.

Could, therefore, the court deny the accused the right of trial by jury? Would not that affect the jurisdiction of the court? If, then, *the assistance of counsel for his defense of his own selection*

is the highest privilege guaranteed under our Constitution, the right to be tried by a jury can be no higher privilege, and if the denial of the latter right is a jurisdictional question and affects the power of the court constituting an act in excess of its power, authority or jurisdiction, why would not the denial of the right, the most important of all, or equally as important as that of the right of trial by jury, render the proceedings void? *Both are prerequisite to trial.*

In reviewing the authorities upon the question here raised we find no precedent. The question has never been raised in this court, and we have no decisions directly on this point to be guided by. There is nothing left to us but to still insist that the right is absolute and as equally important as any of those denied by the courts of this country, and which have been held to be jurisdictional, and to show why the deprivation of the right of a person accused of a capital offense (the highest crime known to our laws), to have the assistance of counsel *of his own selection*, is an act in excess of the power and jurisdiction of the court.

In the case of Ex parte Hans Neilson, 131 U. S., page 182, Mr. Justice Bradley also says in the first part of his opinion:

"The objection to the remedy of *habeas corpus*, of course, would be that there was in force a regular judgment of conviction which could not be questioned collaterally as would have to be on *habeas corpus*. But there are exceptions to this rule which have more than once been acted upon by this court." And with much resolution and conclusiveness, the eminent jurist asserts:

"It is firmly established that if the court which renders a judgment has not jurisdiction to render it either because the proceedings or the law under which they are taken are unconstitutional, or *for any other reason* the judgment is void, may be questioned collaterally and the person who is in prison under and by virtue of it may be discharged from custody on *habeas corpus*."

If it is the most important of all the privileges guaranteed under our Constitution, as is claimed by Mr. Cooley, and if it is true that the Constitution bounds and limits all jurisdiction, it must be admitted that any act of a court which violates this im-

portant of all privileges guaranteed under the law which sets its limits upon the power and jurisdiction of all courts, is certainly an act in excess of its power and jurisdiction. It can readily be observed that to deny the right of the prisoner to be defended by counsel of his own selection, would imply that the court had the right to *deny* him the right to have counsel. If this discretion could be exercised by courts and judges in the face of this constitutional provision, it would be an assumption of power that would virtually place the life and liberty of the accused within the arbitrary power of the court. It cannot be denied that if the court could nullify and set aside the wishes of the prisoner in selecting his own counsel, it would be in the power of the court to direct any person whom he might wish to represent the prisoner, and who at the same time might be an avowed enemy of the accused either for political or other reasons, and whose interests might be at variance with the interests of the prisoner. Who would dare say that this would not be a mockery and an absolute nullification of the high right to the independent defense which the Constitution insures in all criminal prosecutions? We submit that this privilege cannot be impaired either by courts or by legislative will, and that any *act* which deprives, or tends to deprive, the accused of this high right, *conferred under this amendment*, is an act in excess of the power or jurisdiction of any court or judge. The Constitution has made this right as *equally certain* as the right of trial by jury; as *equally certain* as that which requires an indictment in capital cases or other felonies; rights never intended to be subject to the mutation of legislative power, or the hazard of judicial discretion.

We submit that the action of the trial judge was an act in excess of his power or jurisdiction, because, further, as an officer of the State, whose powers are limited, and whose jurisdiction is defined by law, he cannot encroach upon the rights of an individual to the extent of depriving him of the most important of all privileges; he cannot exercise a greater right than the government which created him, and whenever it is admitted that the court, or an officer of the court, can deprive the accused of the right to have the assistance of counsel of his own selection, the

Constitution and its provisions have no meaning, and it lies within the power of any officer or judge of a court to annul and evade its provisions at will.

Referring to that part of the record which has no connection with the petition, the government, by consent of counsel for the petitioner, has introduced a letter and made it a part of the record in this case (see Record, page 4). We submit that in granting or refusing the writ upon the petition for the same, the law applicable in such cases is governed by Section 755 of the Revised Statutes of the U. S., which says as follows:

"The court, or justice, or judge, to whom such application is made, shall forthwith award a writ of *habeas corpus* unless it appears from the petition itself that the party is not entitled thereto." And,

"Whether the writ shall issue or not, depends upon the facts presented in the *petition* showing a cause for his release."

Ex parte Kinney, 3 Hughes, 9.

And,

"The truth or falsity of the facts must be determined at the hearing." Ex parte Hayne, 9 Chic., L. M., 106.

We submit, therefore, that we are reduced to the issue involved in the petition itself, and that if the question raised therein is a question which goes to the power or jurisdiction of the court, the writ should issue. That any fact presented on the hearing of the application which is intended to rebut the facts or allegations set forth in the petition, does not affect our right to the writ, *as the truth or falsity of the facts must be determined at the hearing.*

We submit that the letter has no connection with this case, and never did; that the petitioner's name is in no wise connected with its execution, and that he is not referred to even in its contents. It refers to other defendants, and as a matter of fact, it was not intended to refer to the petitioner. Its introduction was consented to by counsel for the petitioner at the request of the District Attorney, upon representations made by him which developed, after the record was made up, were incorrect, evidently by unintentional error on his part. Its proper connection with the record can never be known unless a hearing can be had

upon the writ. The letter however, indirectly, bears an important meaning and as it is contended by counsel, as a matter of law, that the truth or falsity of the allegations in the petition cannot be determined upon the application, but that this is left to the hearing on the writ, counsel do not deem it proper to discuss any question or fact explanatory or contradictory of the purposes of its introduction, but prays the court that the writ may issue in order that the true meaning, and all the circumstances which surround its execution, may be made known. The question may be asked with some propriety without contradicting the record or undertaking to argue any question of fact, *why the letters made a part of the record were written?* Why the name of *John Andersen* was erased from one of them? Why his name does not appear signed to this one, unless he had been denied the right to select counsel who represented the other prisoners, and on that account caused his name to be stricken out. (The court's attention is called to the *omission* in the printed record, of the name of John Andersen stricken out, see page 8 original record). Have letters from counsel ever been introduced in any other case before this court?

These letters evidently show that something happened. Why was it necessary to make apologies in writing, to be filed away, and then used at this crisis of affairs, to beat down the last effort of the accused in trying to enforce a right?

This court will not tolerate any hedging. If a wrong has been done let it be admitted and corrected. Human life should not be destroyed by tactics, but by due process of law, when made answerable for the commission of crime. No principle, nor the proper enforcement of law, can ever suffer by a clear understanding of all the facts and circumstances surrounding a judgment of death.

The order wherein it is claimed that counsel was assigned the petitioner according to Section 1034 of the Revised Statutes is also made a part of the record (Record, pages 3 and 4) by consent all parties. Why does this order not refer to *the indictment* upon which your petitioner was *tried* and *convicted*? Why was this order (which does not refer to the indictment upon which the

petitioner was tried and convicted) made a part of the record of a trial under another indictment? We submit that the record may be true, and that counsel named in the order was assigned by the court and at the prisoner's request, yet this was after the refusal of the court to allow the petitioner to select counsel referred to in the petition.

Accepting the statements in this order, for the sake of argument, to be true, we contend that its contents do not deny the facts or allegations set up in the petition, as the order is not conclusive that the rights of the petitioner as to the assistance of counsel of his own selection have not been denied him. For it is a fact, and can be established at the hearing, if the writ is granted, that after the petitioner discovered that he could not enjoy the right to have the assistance of counsel *of his own selection*, he acquiesced in the assignment of counsel whose name is embodied in the order. We contend again that the order is not conclusive, that the denial of the right to have the assistance of counsel of his own selection, was not *prior* to the entering of the order, and assignment of counsel named in the order.

We beg to submit that in order to even connect this order with the authority of counsel named in said order, to proceed with the defense of the case under the indictment which was the basis of the trial resulting in the conviction of the petitioner, it became necessary for the court before whom the petition for the writ was heard, *to certify* as a part of the order embraced in the record in this case, that indictment 241, under which the petitioner was tried and convicted of murder, *was not embraced in this very order* which has been made a part of the record in this case, to deny the allegations of the petition for the writ. This certificate of the court is an *absolute refutation* of the order embraced in the transcript of the trial and made a part of the record in this case. The fact that the court certified that counsel whose name was mentioned in the original order continued to represent the prisoner upon his trial in the Circuit Court of the United States does not show that he represented him with the *authority* of Andersen. Even though it may have been the case that he did so with his authority, no inference can be drawn in favor of the

government against the sworn statements of the petitioner. Even had the order *embraced* the indictments under which the petitioner was tried and convicted, it would not be conclusive then, as petitioner contends that the refusal and denial of the right, to have the assistance of counsel of his own selection, was a part of a transaction antecedent to the assignment of counsel named in the order, and before counsel of the court's selection was really assigned to the prisoner. We submit that the wrong has been done, that the right has been violated, and even the subsequent acquiescence of the prisoner which the order tends to show could not waive the wrong. This right denied him adheres to the whole proceeding, and no acquiescence in the action of the court could cure an act already permitted in excess of its power or jurisdiction.

Reference is again made to the order (transcript, page 6) assigning counsel for the petitioner. Among other things the order sets forth that on the 8th day of November, 1897, the court upon its own motion, as well as upon the request of the accused, assigned counsel for the petitioner under and by virtue of notice of Section 1034 Revised Statutes of the United States.

The petitioner sets forth in his application for the writ (transcript, page 2) that on the 7th day of November, 1897, he was delivered to the United States Marshal, also on the following day was examined without the presence of counsel. The petitioner also asserts, which is not denied, that he was indicted subsequent to this time. This indictment was long after November 8th, 1897. In other words, the petitioner sets forth that on November 8th, 1897, when counsel was assigned him, *he was not under indictment.*

We submit that Section 1034 gives the court the right to assign counsel "to every person *who is indicted* of treason, or other capital crime." Therefore we ask why did the court assign him counsel as set forth in the order, on November 8th, 1897, *before he was indicted,* and before the court had the right to assign counsel at his request, under Section 1034? Not only did the court assign him counsel at his own request, on November 8th, 1897, *before he was indicted, but assigned him counsel as well upon its own motion.*

We submit that this act was not only in defiance of Section 1034 of the Revised Statutes, but absolutely in excess of the power of the court, even had counsel been assigned at the request of the petitioner ; much more was it an act in excess of the power of the court, when it undertakes to assign counsel *of its own motion*, before the time authorized under this statute.

If this assignment was induced by a general solicitude for the prisoner's welfare, why was the assignment of counsel made on the day of the preliminary hearing, *but after* the preliminary hearing had been concluded, and long before the indictment was found ?

In Hopt vs. People, etc., 110 U. S., 574, Mr. Justice Harlan, in delivering the opinion of the court, said :

"That the right of the accused to be present before the triers was not waived by his failure to object to their retirement from the court-room or to their trial of the several challenges in his absence." He further says :

"We are of opinion that it was not within the power of the accused or his counsel to dispense with a statutory requirement of his personal presence at the trial. The requirement to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as to the end of human punishment. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty, cannot be dispensed with or affected by the consent of the accused, much less by his mere *failure* when on trial or in custody *to object* to *unauthorized methods*."

We submit he could not waive the wrong. Amid the solemnities of a court or before a judge having the power of life and death over the prisoner on trial for his life, it would be an act of unparalleled courage to do other than acquiesce in the action of

the court. The attorney who had been brushed aside before the trial, could not defy the court by insisting on his presence at the trial. The attorney assigned could make no objection or offer an exception inconsistent with his own position. It was an *arbitrary act before trial* and could not consistently reach the record to be corrected on error. The free exercise of this right was prerequisite to legal trial. Its denial made the trial unilateral in its nature, and not a legal trial. It was not *his* defense, but the government's defense, whose power extends to prosecute. *His* defense is his absolute right. This question affects the independence of his defense, as well as his whole trial, and is, therefore, jurisdictional in its broadest sense.

This country, through its constitutional provisions, has been foremost among all nations in proclaiming principles of personal liberty and security, and in providing safeguards to individual rights, and in doing so has placed *the right* which has been *denied* the petitioner under the ægis of her Constitution, and he appeals to this court in his behalf, and in behalf of the liberty of every citizen, that no encroachment upon the highest privilege guaranteed to them should be tolerated.

We believe the writ should issue.

P. J. MORRIS,
HUGH G. MILLER,
Counsel for Petitioner.

J. G. Bigelow,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1909.

JOHN ANDERSEN, *Appellant*,

vs.

MORGAN TREAT, U. S. MARSHAL FOR THE EASTERN DISTRICT OF VIRGINIA, *Appellee*.

APPELLANT'S BRIEF

ON GOVERNMENT'S MOTION TO DISMISS APPEAL.

P. J. MORRIS,
H. G. MILLER,
Counsel for Appellant.

IN THE

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OCTOBER TERM, 1898.

JOHN ANDERSEN, *Appellant*,
vs.
MORGAN TREAT, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF VIRGINIA, *Appellee*. } No. 415.

APPELLANT'S BRIEF.

On Government's motion to dismiss appeal from the order of the District Judge for the Eastern District of Virginia, denying a writ of *habeas corpus*, etc.

In answer to the brief of the Solicitor General on his motion to dismiss the appeal from the order of the District Judge for the Eastern District of Virginia, denying a writ of *habeas corpus* in the above entitled cause, the appellant submits that this appeal was not taken for delay, but was taken to *enforce a right* guaranteed under Article VI. of the Amendments to the Constitution of the United States, which the appellant claims has been denied him.

Counsel for appellant submit that the appeal has been perfected, and that a brief upon its merits has been prepared, and that no lack of good faith has been manifested in these proceedings to sufficiently warrant the Solicitor General in using the language he has in his brief, as well as impugning the motives of counsel. The question which has been raised

in the petition is based upon Article VI. of the Amendments to the Constitution of the United States, and therefore a *constitutional question*, and is as follows:

QUESTION INVOLVED.

"In any criminal prosecution under the laws of the United States, if a person charged with a capital offense is *denied the right to have the assistance of counsel of his own selection*, is the denial of that right an act in excess of the power or jurisdiction of the court?"

THE FACTS UPON WHICH OUR CASE RESTS.

The following extract from the petition for the writ, sets out the facts in regard to the question raised:

"Your petitioner represents that on the 7th day of November, 1897, he was delivered to the United States Marshal for the Eastern District of Virginia, charged with having committed the crime of murder within the maritime jurisdiction of the United States of America; that as a prisoner of the said United States Marshal, he was confined on the day of his delivery in the city jail, of the city of Norfolk, to await his examination as provided by law, before the United States Commissioner for the Eastern District of Virginia, and that on that day, namely, the 7th day of November, 1897, while thus detained in the city jail of the city of Norfolk, he employed as counsel to represent him, one P. J. Morris, Attorney-at-Law, residing in the city of Norfolk, Virginia.

Your petitioner further represents that after securing the services of said Morris, on the same day the said Morris called at the city jail, the place of the detention of your petitioner, and asked permission to see your petitioner to consult with him as attorney and client.

Your petitioner represents that admission was refused his said attorney for the reason that the District Attorney for the United States, for the Eastern District of Virginia, had instructed the jailer and others in charge of your petitioner, to

allow no one, without exception, to see your petitioner; whereupon he represents that on the 7th day of November, 1897, his said attorney asked permission by 'phone of the District Attorney for the Eastern District of Virginia, to permit him to visit said jail and consult with your petitioner. The said application was refused, and on account of the order of the District Attorney lodged with the jailer and keeper of the prison in which your petitioner was detained, your petitioner was denied the right of the assistance of counsel to represent him.

Your petitioner further represents that the District Attorney for the Eastern District of Virginia informed your petitioner's counsel on the night of the 7th of November, 1897, that he would let him know on the following day whether or not permission would be granted your petitioner's counsel to consult with your petitioner. Your petitioner represents that instead of informing his said attorney, and giving his said attorney full notice as to the time when your petitioner's preliminary hearing would be held, and before the United States District Attorney for the Eastern District had given his said attorney permission to consult with him, he was taken, in irons, handcuffed, to the office of the United States Commissioner, and examined without the aid or presence of his attorney.

Your petitioner further represents that before the time of said examination was completed, and statements made by him were finished, his said attorney discovered that the said examination was going on without his presence, and before any consultation could be held between your petitioner and his said attorney. His said attorney thereupon applied to the District Attorney of the United States, and to the Hon. Robert Hughes, late Judge of the Eastern District of Virginia, and was told by them that as the defense of your petitioner was inconsistent with the defense of the others charged at the same time with complicity in the destruction of the vessel Olive Pecker, that any attorney representing

both prisoners was objectionable, and that the court would not permit the same attorney to represent your petitioner and the other prisoners, and therefore the court would assign him an attorney to represent him.

Your petitioner therefore represents that he was deprived of the free exercise of his rights to be represented by counsel in accordance with Article VI. of the Amendments to the Constitution of the United States, and that, therefore, the action of the court in depriving him of the right to select his own counsel the court exceeded its power and jurisdiction, and that, therefore, the trial and proceedings therein are null and void, and that the judgment and sentence of the court are void and in violation of his constitutional rights, as he will show."

Counsel for appellant submit that if there is sufficient averment in the petition to raise this issue, the court is bound to overrule the motion and grant a hearing on the writ.

We contend that the law governing these proceedings is based upon Section 755 of the Revised Statutes of the United States, which says as follows:

"A court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus* unless it appears from the petition itself that the party is not entitled thereto."

This is statutory, and necessarily binds the court to a consideration of the facts in the petition and nothing beyond that.

Reference is made to *ex parte Kinney*, 3 Hughes, 9, which says:

"Whether the writ shall issue or not depends upon the facts presented *in the petition* showing a cause for his release.

"And the truth or falsity of the facts must be determined at the hearing." Ex parte Haynes, 9 Chic., L. M., 106.

We submit, therefore, that we are reduced to the issue involved in the application for the writ alone, and that if the question raised therein is a question which goes to the power

or jurisdiction of the court, the motion to dismiss should be overruled; that any fact presented on the hearing of the application, or on appeal from the hearing on the application for the writ, which is intended to rebut the facts or allegations set forth in the petition, does not affect our right to a hearing, as the truth or falsity of the *facts* must be determined at the *hearing;* the petition itself determining the issuance or non-issuance of the writ.

We submit that the Solicitor General's reply should be as on a demurrer to the petition, and that any statement or conclusion of fact embodied in his brief on the motion to dismiss cannot affect our right to a hearing.

We submit that an appeal lies from the decision of the lower court upon an *application* for a writ of *habeas corpus* or upon such writs when issued as a matter of statutory right. Section 763, Revised Statutes U. S.

We also submit that under rule 6, sub-division 5 of the rules of the Supreme Court, that the motion to dismiss can only be sustained where the right of appeal was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument. We contend that the question involved is a question which goes to the power, authority and jurisdiction of the lower court, as is set forth in the petition for the writ, and is one which does pertain to the denial of a right of the very highest nature. If this be true, the jurisdiction of this court to determine that question cannot be denied, as this court has time and again decided that it has jurisdiction to review by *habeas corpus* the conviction of a person by an inferior court of the United States, either under an unconstitutional act of Congress, or upon all questions involving the deprivation of constitutional rights in excess of the power or jurisdiction of such courts.

100 U. S. R., *ex parte Siebold.*
18 Wall, *ex parte* Lange, 163.
93 Wall, *ex parte* Parks.
121 U. S. R., *ex parte* Bain, page 1.

We submit that a motion to affirm, which rests upon the same principle as a motion to dismiss, will be denied if the motion to dismiss cannot be sustained, the court clearly having jurisdiction.

Whitney *vs.* Cooke, 9 Otto, 607.

"Even in reference to writs of error the court will look only into the regularity of the writ, and the fact of the jurisdiction and *other questions must in general await final hearing.*"

New Orleans R. R. vs. Morgan, 10 Wall, 256.

"A writ of error cannot be dismissed on motion simply because it has been brought for delay only. Both parties have the right to be heard on the hearing, and one party cannot require the other to come to such a hearing upon a mere motion to dismiss."

Armory vs. Armory, 61 U. S., 356.

We therefore respectfully submit that where motions to dismiss are not too liberally regarded even in proceedings on error, the court cannot look with greater liberality upon a motion to dismiss an appeal where the appeal is a matter of statutory right, and especially where it involves human life.

The Solicitor General in his brief at a single bound determines the question without reason or argument. He merely says the appeal was taken for delay only, and that it should be dismissed.

We submit that this court, through Mr. Justice Miller, in *ex parte Bigelow*, 113 U. S. R., 228, was not as willing as the Solicitor General to reach a conclusion of law where jurisdictional questions were raised, as he says:

"It may be confessed that it is not always *very easy* to determine what matters go to the jurisdiction of the court so as to make its action when erroneous a nullity."

In event we may be wrong in our contention, we have the consolation of knowing that the dictum of this court, through Mr. Justice Miller, here quoted, is a sufficient apology for the position assumed in presenting a question for determination

which all authorities agree involves a right of the very highest nature under our constitutional provisions.

We submit that this conclusion of Mr. Justice Miller may have escaped the attention of the Solicitor General, although he has referred to this case in his brief.

If all questions are to be heard on the motion to dismiss, which we submit cannot be done, we respectfully submit that the brief prepared by counsel for the petitioner on the merits of the appeal from the decision of the lower court refusing the writ, contains a full statement of the case, including all facts, authorities and argument, and as counsel do not wish to tire the court with a repetition of the contents of our brief on the merits wherein it is insisted that the question raised is a jurisdictional one, we beg to refer to the same, and ask that it may be made a part of *this brief* in answer to the brief of the Solicitor General.

In event that the statements of the Solicitor General in his brief on the motion to dismiss may be considered, as well as his suggestions and his conclusions of fact, which we contend do not enter into this discussion, counsel would not be doing themselves justice if they did not call the court's attention in reply to a few statements urged by the Solicitor General.

On the second page of his brief, he says, among other things, "that Hugh G. Miller and P. J. Morris, '*assuming*' to act as counsel for Andersen, filed with Judge Waddill, of the District Court of the United States for the Eastern District of Virginia, a petition for a writ of *habeas corpus*."

We submit that the record shows that we were his counsel, and we submit that the Solicitor General in making this statement assumes more than the record confirms. We regard it an unjust reflection upon the Judge of the District Court, who saw no reason to question our authority to represent Andersen, and who as a matter of fact did know that we represented Andersen with full authority, and so certified in the record.

The Solicitor General also states (his brief, page 2) "how Andersen, who was without money, and had to have counsel assigned him, could employ Morris on the very day he was turned over by the officers of the Lancaster to the United States Marshal and confined in jail, does not appear." Our reply is, that if counsel saw fit to accept employment with or without pay, or with or without prospect of being paid, that was a matter entirely personal between counsel and his client, over which the Solicitor General had no control. He further says, page 3, his brief, "that it is to be observed that there was no averment that Andersen had at any time applied to the judge and requested that Morris be permitted to see him, or assigned or recognized as his counsel."

We would be pleased to know how Andersen, who had been locked up *incommunicado*, with an order from the District Attorney, on file with the keeper of the prison, that no person be allowed to see Andersen, and that Andersen be allowed to see no person, could have made this request of the judge, even though he had desired to make it, and it had been necessary for him to do so. It was with much difficulty, as can be shown, that Andersen found an opportunity to communicate with his attorney.

We submit that the absence of this averment cannot be construed to operate against the sworn statement of Andersen in his petition. There is sufficient averment in the petition sworn to, setting up that Morris was his attorney.

On page 4 the Solicitor General says as follows:

"The allegation is that Morris, who was expecting employment, not to say *seeking employment*, by the prisoners, applied to the United States Attorney and to Judge Hughes, to see Andersen and to be recognized as his counsel." This is denied by Andersen's petition (see page 2, record), which says "*he employed as counsel* to represent him," etc.

We submit that we have tried to adhere to the record, and to the facts involved in the record. We have not gone beyond

the record. If we had regarded it permissible we could introduce documentary proof to sustain every allegation in the petition for the writ. If the issue is to be reduced to a question of fact, why insist upon the motion to dismiss in order that the facts may not be heard? A human life is involved, and if the issue involves the denial of a right in excess of the power of the court, why not grant counsel a hearing upon its merits? How much longer would it take to finally determine the question involved? If the Solicitor General thinks that we have brought this appeal for delay only, let him agree to the hearing and we will prove the contrary. We regard his analysis of the facts contained in his brief a batch of misconceptions. His brief does not reveal the slightest conclusion of law on the question raised. He does not show, either by authority or argument, that we are wrong. Has he presented the question properly? Can his brief be regarded as a demurrer to the petition? If so, as a matter of law the facts in the petition must be conceded, and no denial of facts is permissible. If he is not demurring to the petition, and merely undertakes to show that the facts are not true, his position is wrong, as the law reserves the truth or falsity of the facts for the hearing. On page 4, his brief, it further appears "that on November 9th, 1897, Morris made a written statement in which he said that Mr. White, the United States Attorney, had treated him with the utmost consideration." We submit that this letter had no reference to Andersen, and we do not contend that in the cases to which that letter refers, Mr. White treated Morris with any lack of courtesy. It is his treatment, and the court's treatment of Andersen, that is involved in this issue, and we certainly know of no rule of law whereby any courtesy shown by the District Attorney to any one else can bind the petitioner.

Reference is also made to the order of the court, page 6 of the Solicitor General's brief, wherein he says the petitioner requested the court to assign other counsel, and the court

accordingly made such assignment. We submit that the transaction complained of was antecedent to the entering of the order, or assignment of counsel; that the assignment was made after the refusal of the court to allow the petitioner to select counsel and after it was definitely known that he could not employ Morris to defend him, the Judge of the court and the District Attorney both stating that the same attorney would be objectionable to the court, and that the court would not permit the same attorney to defend the prisoners. (Record, page 2.) Instead of offering an excuse, and undertaking to show that the petitioner was never denied the right to select his own counsel, why not admit what is generally known, and can be proved: that the District Attorney recognized that the case was a peculiar one—a tragedy at sea; that only six people were involved; that no living being was a witness to the transactions except these six sailors; that the same attorney representing all might probably have prevented a single conviction, and thus save the life of Andersen, all having been charged with offenses punishable by death; and by availing themselves of a constitutional right—"that no man can be compelled to testify against himself"—the District Attorney would have found himself without witnesses. Why not say that this was communicated to the judge, and it was thereupon determined that the *defense* of these prisoners should be *separated*, and that the attorney originally representing all should be permitted to represent a portion of them, and the court would assign an attorney to represent the other just after the preliminary hearing, and long before trial and indictment found. We submit that from the standpoint of the prosecution, the same attorney was objectionable, and it can be easily seen why. We ask by what right, power, or authority, had the court to summarily brush aside, at the direction of the District Attorney, counsel of the petitioner's own selection? That is the question that is involved, and these are the facts that led to the

present condition of affairs. We ask that the truth be known. We ask that this court know the facts. If we are right in our contention the law makes it so. If we are wrong we shall rest secure with duty performed. A great principle, as well as a human life, is involved.

On page 6 of his brief the Solicitor General says as follows:

"It is unnecessary for me to emphasize the propriety of Judge Hughes' action in insisting that Andersen, upon an issue of life or death, should have his own counsel of standing and ability, unembarrassed by employment by any others concerned in the transactions on the Olive Pecker."

We submit that after a long effort to deny the facts set forth in the petition the Solicitor General *has confessed* that Judge Hughes *did insist* that Andersen, upon an issue of life or death, should have counsel unembarrassed by employment by any others concerned in the transactions on the Olive Pecker.

This statement puts the stamp of truth upon every allegation in the appellant's petition for the writ, which shows that the court *did insist* that Andersen could not have counsel of his own selection because counsel of his own selection were representing others, but that he could have counsel *unembarrassed by employment by any others concerned in the transactions* on the Olive Pecker. *It is a confession.* It admits what the District Attorney for the Government has endeavored to show was not true by securing permission to embody in the record letters intending to rebut and deny the allegations of the appellant's petition by the indirect admission of others It admits the truth of our contention, and absolutely denies his own position in his effort to deny the truth of the petition. It is a matter of fact *that all of the crew* were charged or held for offenses punishable by death. Why should the Government's solicitude be greater for the life of one man than for the lives of five? The issue of life

or death applied to all. Was, therefore, Andersen or the Government embarrassed by one attorney representing all the defendants, facing the constitutional right that no man can be compelled to testify against himself?

We submit that it is not denied that Andersen had the assistance of counsel at certain stages of the proceedings, but what we contend is that he was denied the right to have the assistance of counsel for his defense, of his own selection, at a time prior to the assignment of counsel. We contend that the denial of this right was at a time when no objection could be made or exception offered, when no court was in session, long before the indictment was found and when it could not reach the record and could not possibly be corrected by proceedings in error.

Reference is again made to the order (transcript, page 6) assigning counsel for the petitioner. Among other things the order sets forth that "on the 8th day of November, 1897, *the court, upon its own motion*, as well as upon the request of the accused, assigned counsel for the petitioner under and by virtue of notice of Section 1034 of the Revised Statutes of the United States." The petitioner sets forth in his application for the writ (record, page 2) that "on the 7th day of November, 1897, he was delivered to the United States Marshal, and that also on the following day was examined without the presence of counsel." The petitioner also makes oath, which is not denied, that he was indicted *subsequent* to this time. This indictment was *long after* November 8th, 1897. In other words, the petition sets forth that *on November 8th, 1897*, when counsel was assigned him, *he was not under indictment.*

We submit that Section 1034 gives the court the right to assign counsel to *every person who is indicted of treason or other capital crime.* Therefore we ask, why did the court assign him counsel, as set forth in the order of November 8th, 1897, before he was indicted and before the court had

the right to assign counsel, even at his request, under and by virtue of Section 1034? Not only did the court assign him counsel at his own request on *November 8th, 1897, before he was indicted*, but assigned him counsel *as well upon its own motion.*

We submit that this act was not only in defiance of Section 1034 of the Revised Statutes, but absolutely in excess of the power of the court, even had counsel been assigned at the request of the petitioner; much more was it an act in excess of the power of the court when it undertakes to assign counsel of its own motion before the time authorized under Section 1034 of the Revised Statutes. If this assignment was induced by a general solicitude for the prisoner, as the Solicitor General states, why was the assignment of counsel made on the same day of the preliminary hearing, *but after the preliminary hearing had been concluded*, and long before the indictment was found? The Solicitor General has also said, (page 3 of his brief) "On the night of the same day the United States Attorney informed Morris that he would let him know on the following day whether permission would be granted him to consult with Andersen."

"Before Morris was given this permission and notice to Morris of the time of the preliminary hearing, Andersen was taken to the office of the United States Commissioner and was examined without the aid and presence of Morris." This is his quotation from the petition in the record.

He thereupon says: "It appears subsequently that this examination was purely voluntary on the part of the prisoners." It is this last statement that we deny when made applicable to Andersen. This referred to the other prisoners in the letter written to Mr. White (see record, page 4). This effort to make this letter apply to the preliminary hearing of Andersen is an imposition upon the rights of the petitioner as well as upon the court, as we contend that this very letter would never have reached the record except for

statements made which subsequently developed were incorrect, but which we presume was the result of an unintentional error.

The Solicitor General also says (page 4 of his brief), "Boiled down, the claim is that Andersen was deprived of a constitutional right and a subsequent trial rendered null and void because certain requests of Morris were refused." The record discloses, page 2 in the petition for the writ, signed and sworn to by Andersen, that certain requests were made by Morris which were authorized by Andersen to be made. Does the Solicitor General mean to deny the right of Andersen to have counsel to make certain requests while the prisoner himself was in a dungeon, behind an order lodged with the jailer denying him communication with any living being? The petition sets forth that Morris was acting for Andersen and with Andersen's full authority.

The Solicitor General refers to the case of *ex parte Yarbrough*, 110 U. S., 653. The question in this case raised was on the insufficiency of the indictment which could have been raised during the trial and could have been taken advantage of on error. He also refers to the case of *ex parte Bigelow*, 113 U. S., 328, involving the question which the Supreme Court of the District of Columbia passed upon. Also to *ex parte Harding*, 120 U. S., 782, it was a question of the denial of compulsory process and may have occurred during trial, although the record fails to disclose at what stage of the proceedings it happened. Also *in re Wood*, 140 U. S., 278, was on an objection to the formation of the jury because it had no African citizens among them, although no law was shown to have been violated. Also *in re Wood*, 140 U. S., 95, the question was whether a man could be executed because no mandate had been sent down from the higher court although the decision had been affirmed. Also *in re Wilson*, 145 U. S., 75, was a question involving the deficiency in the number of the grand jurors. In that case a matter of law was in-

volved; challenge was made and overruled and passed upon by the court. *In McElvane vs. Bush*, 142 U. S., 160, involves the construction of a statute, contending that solitary confinement was cruel and unusual punishment, the court upholding the statute. In *U. S. vs. Pridgeon*, 153 U. S., 48, the question raised there was that the sentence of the court was void because hard labor was attached to imprisonment, the court deciding that hard labor was implied in imprisonment. We therefore submit that none of the cases which the Solicitor General has submitted has the least bearing upon the question at issue. The question here presented is a new one; it involves the most important right under the Constitution; a right which affects the independence of the whole trial of the accused; a right to be exercised prerequisite to a trial and absolute in its nature; a question upon which no court has ever passed, and which has been declared by one of the leading members of the Virginia bar to be "a question worthy of the best thought of the Judges of the Supreme Court of the United States," but which seems to be entirely at variance with the swift conclusions of the Solicitor General.

The Solicitor General closes his brief, stating in a general way that the appeal has no merit; that it is apparent it is frivolous and taken for delay merely, and further says: "It is to be hoped that the inexperience of counsel for the appellant at this bar may save them from the reproof which the court deemed it proper to administer to counsel in *The Duro*, 3 Wall, 564."

Our duty to this tribunal prevents us from offering any suggestions of a personal nature in reply to the statements of the Solicitor General referring to counsel.

We have not allowed ourselves to be led away from the issue involved by his insinuations. We only wish to submit to this court the question of their propriety.

We ask at your hands a hearing upon the question involved. We do not fear reproof for discharging a sacred

duty where we believe truth is on one side and an attempt to suppress it on the other.

We ask of you a construction of one of the most important provisions of our Constitution, where a person under sentence of death claims it has been denied him, and a precedent is about to be established for all time to come.

P. J. MORRIS,
HUGH G. MILLER,
Counsel for Appellant.